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11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13 KEVIN DROVER, individually and on)
14 behalf of all others similarly situated,)
Plaintiffs,)
15 v.)
16 LG ELECTRONICS USA, INC.,)
17 Defendant.)
18 _____)

CASE NO. 2:12-cv-00510-LRH-VCF

**PLAINTIFF'S OPPOSITION TO
DEFENDANT LG ELECTRONICS
USA, INC.'S MOTION TO DISMISS
THE FIRST AMENDED COMPLAINT**

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1 Plaintiff, Kevin Drover (“Plaintiff”), by his attorneys, hereby submits this response and
2 opposition to Defendant LG Electronics USA, Inc.’s (“LG” or “Defendant”) Motion to Dismiss
3 the First Amended Class Action Complaint (“FAC”) and states as follows:

4 **STATEMENT OF FACTS**

5 Plaintiff’s action involves identified LG plasma and LCD televisions, including models
6 32LC2D, 37LC2D, 42LC2D, 42PC3D, 42PC3DV, 47LC7DF and 50PC3D (the “Televisions”).
7 Complaint ¶1. Plaintiff alleges that the Televisions’ printed wiring boards (also known as printed
8 circuit boards) (“PWBs”) prematurely fail during normal operation. FAC at ¶7. The PWBs
9 incorporate integrated components such as circuit chips, resistors, surface capacitors and chip
10 capacitors. *Id.* A well-designed and manufactured television will have PWBs that will last the
11 expected useful life of the Television. *Id.*

12
13 The PWBs of the Televisions prematurely fail due to voltage overload, ripple current, and
14 thermal fatigue. *Id.* at ¶8. Voltage overload and thermal fatigue can be caused by insufficient
15 cooling fans, heat sinks and other ventilation issues. *Id.* The premature failure is caused by
16 design and manufacturing defects. *Id.* The Televisions are defectively designed and/or use
17 defective materials because normal operation and usage of the Televisions exposes the PWBs to
18 excessive heat and/or excessive voltage, which, in turn, causes them to fail. *Id.* at ¶9. Therefore,
19 the Televisions fail before expiration of their expected useful life. *Id.* As a result of the design
20 defect in the Televisions, numerous purchasers of these Televisions have complained to LG, as
21 evidenced by the numerous complaints found on the Internet. *Id.* at ¶11. LG has had actual
22 knowledge of the design defect in the Televisions. *Id.* Despite this knowledge of the Defect, LG
23 has refused to pay for labor or diagnostic expenses for consumers with Televisions manifesting
24 the Defect more than a year after purchase (after the expiration of the twelve month parts and
25

1 labor warranty), and LG has refused to pay any part of the cost of repairing Televisions which
2 manifest the Defect one year after purchase. *Id.* at ¶13.

3 Consumers of LG's Televisions could reasonably expect their Televisions to function
4 well beyond the twelve month parts and labor warranty provided by LG's boiler-plate warranties.
5 *Id.* at ¶14. LG knew that the defective design of the Televisions would render the time limitations
6 in its written warranty grossly inadequate to protect consumers from the Defect, and would
7 subject consumers to expensive repair costs. *Id.* The Defect described here and in the FAC is a
8 material fact related to the reliability and normal operation of the Televisions known only to LG.
9 *Id.* at ¶12. Had Plaintiff and members of the Class known about the defect, they would not have
10 purchased their Televisions. *Id.*

12 Plaintiff Drover purchased for use in his home an LG LCT Television model number
13 47LC7DF in late 2008. *Id.* at ¶4. Plaintiff purchased the Television from Best Buy in St. George,
14 Utah. *Id.* Plaintiff also purchased a two year extended warranty. *Id.* In September, 2011,
15 Plaintiff's Television first began exhibiting the Defect described herein – the Television was
16 slow to turn on, and there were clicking noises when turning the Television on. *Id.* The problem
17 gradually worsened, and the Television would take twenty minutes or more to turn on. *Id.*
18 Plaintiff eventually left his Television on all the time. *Id.* In January of 2012, Plaintiff contacted
19 LG via telephone to obtain a repair. *Id.* Plaintiff spent approximately forty-five minutes to one
20 hour on the phone with LG's customer service representative attempting to resolve the problems
21 with the Television. *Id.* The problem could not be resolved, and the LG customer service
22 representative advised Plaintiff that his Television was out of warranty and that Plaintiff would
23 have to pay out-of-pocket for any repairs. *Id.* On March 19, 2012, Plaintiff contacted TV Video
24 Clinic to obtain a repair of his Television. *Id.* He advised TV Video Clinic that his Television
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1 was slow to start. *Id.* On March 20, 2012, his Television was repaired by TV Video Clinic. *Id.*
 2 TV Video Clinic repaired the Power Board at a cost to Plaintiff of \$212.50. *Id.*

3 **ARGUMENTS AND AUTHORITIES**

4 **I. Applicable Standard**

5 A Rule 12(b)(6) motion should be granted only if the plaintiff is unable to articulate
 6 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,
 7 550 U.S. 544, 547 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009) (“When there are well-
 8 pleaded factual allegations a court should assume their veracity and then determine whether they
 9 plausibly give rise to an entitlement to relief.”). In considering a motion to dismiss, the court
 10 accepts the plaintiff’s allegations as true and construes them in the light most favorable to the
 11 plaintiff. *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding*
 12 *Corp.*, 320 F.3d 920, 931 (9th Cir. 2003). The sufficiency of the complaint must be determined
 13 considering the allegations in their entirety and viewing all facts in the complaint as a whole. *Id.*

15 There is a strong presumption against dismissing an action for failure to state a claim. *See*
 16 *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). As such, a motion to dismiss
 17 for failure to state a claim should be denied unless it “appears beyond doubt that the plaintiff
 18 cannot prove any set of facts that would entitle him or her to relief.” *Nursing Home Pension*
 19 *Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1229 (9th Cir. 2004).

21 **II. Plaintiff Has Stated A Valid Claim For Violation Of The Nevada Deceptive Trade Practices Act**

22 Plaintiff brought a claim for violations of the Nevada Deceptive Trade Practices Act
 23 (“NDTPA”). Nev. Rev. Stat. § 41.600. Pursuant to the NDTPA, an action may be brought by any
 24 person who is a victim of consumer fraud. Nev. Rev. Stat. § 41.600 (1). Consumer fraud includes
 25 deceptive trade practices as defined in Nev. Rev. Stat. § 598.0915 and §598.0923. Nev. Rev.

1 Stat. § 41.600 (2)(e). A deceptive trade practice includes “[k]nowingly mak[ing] a false
 2 representation as to the characteristics, ingredients, uses, benefits, alterations or quantities of
 3 goods or services for sale or lease or a false representation as to the sponsorship, approval, status,
 4 affiliation or connection of a person therewith”; “[r]epresent[ing] that goods or services for sale
 5 or lease are of a particular standard, quality or grade, or that such goods are of a particular style
 6 or model, if he or she knows or should know that they are of another standard, quality, grade,
 7 style or model”; and “[k]nowingly mak[ing] any other false representation in a transaction.” Nev.
 8 Rev. Stat. § 598.0915 (5), (7) (15). Additionally, a deceptive trade practice includes “[f]ail[ing]
 9 to disclose a material fact in connection with the sale or lease of goods or services.” Nev. Rev.
 10 Stat. § 598.0923 (2).

11
 12 **a. The Applicable Pleading Standard for NDTPA Claims**

13 Defendant argues that the Plaintiff’s claims must be analyzed under the standards set
 14 forth in Rule 9(b). In support, LG cites *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D.
 15 Nev. 2009). Although *Picus* does indeed set forth the presumed elements for a claim under the
 16 NDTPA (since the Nevada Supreme Court has not yet ruled on that specific issue) as: “1) an act
 17 of consumer fraud by the defendant [that] 2) caused 3) damage to the plaintiff,” the court did so
 18 using the Rule 12(b)(6) standard, and **made no mention of using a Rule 9(b) standard.** *Id.* at
 19 655, 658-59.

20 Plaintiff did not allege a separate cause of action for fraud. His claim under the NDTPA
 21 is based on the failure of LG to disclose the defect known only by Defendant to consumers. As a
 22 number of courts have held, “[a] fraud by omission claim does not need to meet the strict
 23 requirements of Rule 9(b).” *Morris v. BMW of N. Am.*, 2007 WL 3342612 at *5 (N.D. Cal. Nov.
 24 7, 2007). Indeed, “[w]here the fraud consists of omissions on the part of the defendants, the
 25 plaintiff may find alternative ways to plead the particular circumstances of the fraud. For

1 example, a plaintiff cannot plead either the specific time of the omission or the place, as he is not
2 alleging an act, but a failure to act.” *Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D.
3 Cal. 1987) (citing *Lindemuth v. Shannon Fin. Corp.*, 637 F. Supp. 991, 994 (N.D.Cal. 1986)); *see*
4 *also Swedish Civ. Aviation Admin. v. Project Mgmt. Ents., Inc.*, 190 F. Supp. 2d 785 (D. Md.
5 2002) (describing a very common sense approach that “[d]espite the general rule regarding
6 specificity, such particularity cannot be met in a concealment case, however, because an
7 omission cannot be described in terms of the time, place, and contents of the misrepresentation
8 or the identity of the person making the misrepresentation.”) (internal quotations and citations
9 omitted).

10
11 In any event, Plaintiff met his pleading burden under both Fed. R. Civ. P. 8(a) and 9(b).
12 Plaintiff alleged that the PWBs of the Televisions contain an inherent design defect which leads
13 to premature failure due to voltage overload, ripple current, and thermal fatigue caused by
14 insufficient cooling fans, heat sinks and other ventilation issues. FAC at ¶8. The Televisions are
15 defectively designed and/or use defective materials because normal operation and usage of the
16 Televisions exposes the PWBs to excessive heat and/or excessive voltage, which, in turn, causes
17 them to fail before the expiration of their expected useful life. *Id.* at ¶9. Plaintiff has alleged that
18 LG had actual knowledge of this design defect due to the number of consumer complaints
19 Defendant received and due to the presence of voluminous complaints posted on the internet,
20 such as at AVForums.com, Badcaps.net Forum, and Electro Tech Online. *Id.* ¶11. An article at
21 http://en.wikipedia.org/wiki/Capacitor_plague describes the issue with a rash of capacitors with
22 higher than expected premature failure rate, beginning in September 2002. The article notes that
23 there were many publicized press releases about the widespread problem with premature failures
24 in various electronic equipment.
25

1 Plaintiff has further alleged sufficient detail regarding his particular Television purchase
 2 and his experience with the Defect and his attempts to obtain a repair for same. He purchased his
 3 television, with a two year extended warranty, in late 2008 from a Best Buy in St. George, Utah.
 4 *Id.* ¶4. In September, 2011, Plaintiff's Television became slow to turn on, and there were
 5 clicking noises when turning the Television on. *Id.* The problem gradually got worse, and the
 6 Television would take twenty minutes or more to turn on. *Id.* Plaintiff eventually left his
 7 Television on all the time. *Id.* In January of 2012, Plaintiff contacted LG via telephone to obtain
 8 a repair. *Id.* The problem could not be resolved, and the LG customer service representative
 9 advised Plaintiff that his Television was out of warranty and that Plaintiff would have to pay out-
 10 of-pocket for any repairs. *Id.* On March 20, 2012, Plaintiff obtained a repair of his Television,
 11 which consisted of a repair of the Power Board, at a cost of \$212.50. *Id.*

13 Plaintiff has sufficiently alleged his NDTPA claim. Defendant's motion to dismiss should
 14 therefore be denied in its entirety.

15 **III. Plaintiff Has Stated A Valid Claim For Unjust Enrichment¹**

16 The elements of unjust enrichment are: (1) a benefit conferred on the defendant by the
 17 plaintiff, (2) appreciation by the defendant of such benefit, and (3) acceptance and retention by
 18 the defendant of such benefit under circumstances that it would be inequitable for him to retain
 19 the benefit without payment of the value thereof. *Leasepartners Corp. v. Robert L Brooks Trust*
 20 *Dated Nov. 12 1975, 942 P.2d 182, 197 (Nev.1997).*

22 Plaintiff alleged that a benefit has flowed to LG in that consumers purchased LG
 23 Televisions. Further, LG received money from their sales of the Televisions. Finally, Plaintiff
 24 alleged that LG knew the Televisions contained defective PWBs and yet, despite the complaints

25 ¹ This Court previously ruled there is no claim for unjust enrichment; however, Plaintiff kept these claims in his First Amended Complaint for the purposes of preserving this issue for any future appeals.

1 it received, continued to sell the Televisions without correcting the underlying defect. Thus,
2 Plaintiff has satisfactorily pled all elements of his unjust enrichment claim. Defendant argues that
3 this claim fails because consumers did not buy their Televisions directly from LG, rather than
4 through LG's authorized dealer. Whether the consumers purchased their Televisions directly
5 from LG or through authorized dealers, LG received the benefit of the money paid by the
6 consumers for the purchase of the Televisions.

7
8 Defendant next argues that Plaintiff's claim should be dismissed because the dispute is
9 governed by an express contract. In support, Defendant cites *LeasePartners Corp. v. Robert L.*
10 *Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182 (Nev. 1997); *Josephson v. EMC Mortg. Corp.*,
11 2010 WL 4810715 (D. Nev., Nov. 19, 2010); and *Rockstar, Inc. v. Original Good Brand Corp.*,
12 2010 WL 3154120 (D. Nev., Aug. 9, 2010). However, none of these cases involved a claim for
13 breach of express warranty. *LeasePartners* involved a dispute over an equipment lease,
14 *LeasePartners*, 942 P.2d at 183, *Josephson* involved a mortgage loan, *Josephson*, 2010 WL
15 4810715 at *3; and *Rockstar* involved the terms of an Agent Services Agreement, *Rockstar* 2010
16 WL 3154120 at *1.

17 All three of the above cases involved an active contract, and not an expired warranty. The
18 suit at issue has been brought on behalf of consumers even though their warranty has expired. If
19 the warranty has expired, there is no longer a contract governing the relationship between the
20 parties. In any event, Defendant cited to only one case (although it is cited in support of another
21 proposition) where a claimant has brought both breach of warranty and unjust enrichment claims
22 - *Herrera v. Toyota Motor Sales, U.S.A.*, 2010 WL 3385336 *2 (D. Nev. Aug. 23, 2010). In
23 *Herrera*, the plaintiff brought both breach of warranty claims and an unjust enrichment claim.
24 The unjust enrichment claim was dismissed because plaintiffs failed to plead the existence of any
25

1 money or property conferred to defendants. *Id.* at *2. There was no discussion about whether the
2 existence of the warranty precluded a claim for unjust enrichment. Here, Plaintiff specifically
3 plead that LG received money from the sale of the Televisions. FAC at ¶¶34-37.

4 Plaintiff has sufficiently alleged his Unjust Enrichment claim, and so Defendant's motion
5 to dismiss should therefore be denied in its entirety.

6 **CONCLUSION**

7 For the reasons stated above, Plaintiff respectfully requests that this court deny Defendant
8 LG Electronics U.S.A., Inc.'s Motion to Dismiss the Class Action Complaint in its entirety. In
9 the alternative, Plaintiff requests leave to file an amended complaint to correct any perceived
10 deficiencies.
11

12 Dated October 21, 2013.

13 Respectfully submitted,
14 FEDERMAN & SHERWOOD

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CERTIFICATE OF SERVICE

I HERBY CERTIFY on October 21, 2013, I caused a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT LG ELECTRONICS U.S.A., INC.'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** to be served via the U.S. District Court's Notice of Electronic Filing ("NEF") in the above-captioned case, upon the following:

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